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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 549

AMERICAN PROCESSING AND SALES COMPANY,
(*Petitioner*) *Appellee,*

vs.

NIGEL D. CAMPBELL, COLLECTOR OF INTERNAL REVENUE,
(*Respondent*) *Appellant.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, appellee below, prays that a writ of certiorari issued to review the final order, entered December 9, 1947, by the United States Circuit Court of Appeals for the Seventh Circuit (Judges Evans, Minton, and Lindley), reversing a judgment of the District Court of the United States for the Northern District of Illinois, which had been entered on November 6, 1946.

(1) Summary Statement of the Matter Involved.

This is a suit for the refund of a stock transfer tax assessed upon those shares of the surviving corporation which, in a statutory merger, were issued to the shareholders of the merging corporation.

Pursuant to the Business Corporation Act of Illinois, Rapid Roller Company (the merging corporation) was merged into the petitioner, American Processing and Sales Company. In compliance with the statutory requirement of a statement of "the Manner and Basis of Converting the Shares of" Rapid Roller Company into shares of petioner, the Plan of Merger stated:

> "The conversion of the presently outstanding 5405 shares of stock of the merging corporation into stock of the surviving corporation shall be accomplished as follows:
>
> There shall be issued to the present holders of shares of stock in the merging corporation, prorata, upon the surrender and cancellation of the certificates therefor, certificates representing 1500 shares of the preferred stock and 3800 shares of the common stock of the merging corporation, *said 5405 shares of stock of the merging corporation being changed into said 1500 shares of the preferred stock and 3800 shares of common stock of the surviving corporation.*"

Petitioner paid the 11 cent original issue tax on its said 1500 preferred shares and 3800 common shares (Internal Revenue Code 1802(a)). On April 21, 1945 petitioner was assessed a further tax of 5 cents per share on the supposed "transfer of legal title" by the merged corporation to its shareholders of the "rights to receive" said 1500 preferred and 3800 common shares (Code 1802(b)). A judgment for the refund of this tax entered by the District Court of the United States for the Northern District of Illinois was reversed by the U. S. Circuit Court of Appeals for the Seventh Circuit.

(2) Basis of Court's Jurisdiction.

The opinion of the Circuit Court of Appeals was rendered on December 9, 1947. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Act as amended by the Act of February 13, 1925 (43 Stat. 938). The petition is filed in accordance with Rule 38 of this Court. Under Section 8(a) of the February 23, 1925 Act (43 Stat. 940) this petition must be filed within three months after the entry of the judgment to be reviewed.

(3) Question Presented.

The question is whether, in a statutory merger under the laws of Illinois, stock of the merged corporation is *converted into stock of the continuing corporation without change of ownership,* or whether the merged corporation is to be taken *itself to have both acquired the right to receive this stock* in the continuing corporation and *to have transferred that right to its own stockholders.*

The answer to this question determines whether there is a stock transfer tax, in addition to an original issue tax, with respect to this stock of the continuing corporation.

REASONS RELIED ON FOR THE ALLOWANCE OF WRIT.

1. This Court has never passed upon the question whether, in a statutory merger, the issuance of shares in a continuing corporation to shareholders of the merging corporation gives rise to liability for stock transfer tax.

Doubtless this is because the Commission's regulations until 1941 gave "The transfer of the stock of a merged corporation in exchange for stock of the merging corporation" * * * "and the substitution of new certificates for certificates representing the old stock of the merging corporation" as an example of a transaction not subject to tax. (Reg. 71—Art. 35.)

The Commissioner's complete reversal, in 1942, of his former position resulted from a misapplication of the reasoning of this Court in the case of *Raybestos-Manhattan Co.* v. *United States,* 296 U. S. 60. (See M. T. 3,—1942—2 Cum. Bull. 257.) Although the group of transactions involved in the *Raybestos* case included a statutory merger, the Commissioner had made no claim that any liability for stock transfer tax resulted from such merger. Consequently that question had not been before this Court.

2. The departure by the Commissioner, in 1942, from his previous position has given rise to much litigation now pending in the Bureau of Internal Revenue and in the courts. The instant case is the first which has been reviewed by a Circuit Court of Appeals. The determination of this issue by this Court would obviate further litigation in several circuits, and would facilitate the administration of the Revenue Act.

3. The majority opinion of the Circuit Court of Appeals casts doubt on the proper interpretation of statutes and regulations and on the effect of this Court's decision in the Raybestos case, in the following ways:

(a) The Regulations in force from 1926 to 1941 cited, as a transaction exempt from stock transfer tax:

> "The transfer of the stock of a merged corporation in exchange for stock of the merging corporation at the time and as a part of a statutory merger, and the substitution of new certificates for certificates representing the old stock of the merging corporation." (Reg. 71—Art. 35.)

Despite this seemingly clear language, the majority opinion in the instant case asserts that this regulation "left open the question whether the merger situation was within Sec. 1802(b)." (Tr. 44.)

(b) The repeated re-enactments unchanged of Section 1802, during the fifteen years in which the above quoted regulation stood unquestioned, amounted to legislative approval thereof, forbidding the reversal of administrative practice even though the Commissioner may have changed his personal opinion as to the correct interpretation of the statute.

(c) The reasoning of this Court in its decision in the *Raybestos* case, which dealt only with transfers by sales and assignments by corporations, was not applicable to a statutory merger; and the mistaken application of that decision by the Circuit Court of Appeals creates confusion as to the principles governing the determination of stock transfer tax liability.

Wherefore, your petitioner respectfully asks that a writ of certiorari issue out of and under the seal of this Court to review the decision of the Circuit Court of Appeals of the Seventh Circuit, and that the order of said Court be reversed.

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Attorneys for Petitioner.

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vs.

NIGEL D. CAMPBELL, COLLECTOR OF INTERNAL REVENUE,
(*Respondent*) *Appellant*.

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

(1) The Opinions of the Courts Below.

The opinion of the United States Court of Appeals for the seventh Circuit will, it is believed, be reported in 164 Fed. 2d, and it appears at pages 40 to 47 of the transcript of record herein.

The Federal District Court rendered no formal opinion. Its findings of fact appear on pages 24 and 25 of the transcript of record herein.

(2) Grounds On Which Jurisdiction Is Invoked.

In the interest of brevity, reference is made to the paragraph entitled "Basis of Court's Jurisdiction" in the petition for a writ of certiorari, to which this brief is annexed.

(3) Statement of the Case.

A statement of the case will be found under the head of "Question Presents" in the petition for a writ of certiorari to which this brief is annexed. In the interest of brevity, the statement is not repeated in this brief.

(4) Specification of Errors.

It is submitted that the Circuit Court of Appeals erred in the following particulars:

(1) In interpreting Section 1802(b) of the Internal Revenue Code as applying a tax on an imagined assignment by a merging corporation, party to a statutory merger, to its shareholders of the right (erroneously assumed to exist in the merging corporation) to receive shares in the continuing corporation.

(2) In interpreting the decision of this court in the case of *Raybestos-Manhattan, Inc.* v. *United States,* 296 U. S. 60, as applying to a statutory merger of corporations, which merger did not involve any change in the ownership of any stock.

(3) In assuming facts in direct conflict with the findings of fact of the District Court of the United States for the Northern District of Illinois.

(4) In arriving at a decision based on its own assumptions of fact, which assumptions are contrary to the findings of the District Court of the United States and are not sustained by the record.

(5) In reversing the decision of the District Court of the United States upon a question of fact.

(6) In failing to affirm the decision of the District Court of the United States for the Northern District of Illinois.

SUMMARY OF ARGUMENT.

I. A statutory merger of corporations does not involve the transfer, by the merged corporation to its stockholders, of the right to receive stock in the surviving corporation.

Business Corporation Act of the State of Illinois, Section 61(a) and 69(a) & (d). (Illinois Revised Statutes, Ch. 32, Sec. 157.61 and 157.69.)

Helvering v. *Metropolitan Edison Company,* 306 U. S. 520(529).

Chicago, Santa Fe & California Railway v. *Ashling,* 160 Ill. 373(382-3).

Compton v. *Railway Company,* 45 Oh. St. 592 (615).

Silversmiths Company v. *Reed and Barton Company,* 199 Mass. 371(5).

King Estate, 349 Pa. St. 27(31).

II. Treasury Regulations and interpretations in force while the Statutes are repeatedly re-enacted without substantial change are deemed to have received legislative approval and have the effect of law.

Helvering v. *Winmill,* 305 U. S. 79(82).

Commissioner v. *Wheeler,* 324 U. S. 542(7).

Helvering v. *Griffiths,* 318 U. S. 371(396).

Helvering v. *Wilshire Oil Company,* 308 U. S. 90.

Internal Revenue Code, Sections 1802(b), 1836 and 3791.

Regulations 71 (as in effect prior to 1941), Article 35-e.

Regulations 71 (promulgated in 1941), Article Secs. 113.30, 113.33 and 113.34.

III. Statutory mergers are repeatedly recognized and given tax consequences in the Internal Revenue Code and by court decisions.

Internal Revenue Code, Secs. 112(b)(3), 112(b)(9), 112(g), 113(b)(4), 740(b)(3), and 761 (f).

Helvering v. *Metropolitan Edison Company,* 306 U. S. 522(526).

Alaska Salmon Company v. *Commissioner,* 39 B.T.A. 454.

Trahern Pump Company v. *Commissioner,* 27 B.T.A. 363.

Carnation Milk Products Co. v. *Commissioner,* 20 B.T.A. 627.

IV. The question whether a statutory corporate merger involves a stock transfer taxable under Section 1802(b) has never been decided by this Court.

Raybestos-Manhattan, Inc. v. *United States,* 296 U. S. 60, and 10 Fed. Sup. 130 (135).

V. Tax liability accrues only upon the occurrence of a taxable event.

Founders General Company v. *Hoey,* 300 U. S. 268.

American Gas and Electric Company v. *United States,* 69 Fed. Sup. 614.

ARGUMENT.

Introduction.

This case arises under Section 1802(b) of the Internal Revenue Code, the material portion of which reads as follows:

> "Sec. 1802. Capital Stock (and Similar Interests)."
> (b) * * * "Sales and Transfers. On all sales, or agreements to sell," * * * "or transfers of legal title to any of the shares or certificates mentioned or described in subsection (a), or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation or other organization, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale" * * * "on each $100 of par or face value or fraction thereof" * * * "5 cents".

The sole question dealt with in this brief is whether, in a statutory merger of corporations, there is a transfer, by the merging corporation to its shareholders, taxable under the above provisions, of the right to receive shares of stock in the surviving corporation,—being the shares into which their stock in the merging corporation had been converted by the operation of the merger.

POINT I.

A Statutory Merger of Corporations Does Not Involve the Transfer by the Merged Corporation to its Stockholders of the Right to Receive Stock in the Surviving Corporation.

The District Court has made findings of fact, in substance as follows:

(a) That the merging corporation did not, in or

through the merger, acquire the right to receive shares of the surviving corporation's stock; and

(b) That the merging corporation did not transfer to its stockholders the right to receive any shares of stock in the surviving corporation. (Tr. 25, par. 8.)

This Point I is devoted to the proposition that these findings are correct. It follows that the merging corporation cannot have made a taxable sale or transfer of the right to receive this stock.

The merger involved in this case was pursuant to the provisions of the Business Corporation Act of the State of Illinois. Similar statutory provisions are found in the laws of most other states. This act calls for the adoption of a Plan of Merger, setting forth (among other things):

"(c) *The manner or basis of converting the shares of each merging corporation into shares or securities of the surviving corporation.*" (Sec. 61.) Ch. 32, Ill. Rev. Statutes, Sec. 157.61.

When this Plan has been duly approved and incorporated in the Articles of Merger filed with the Secretary of State, the several corporations, parties to the Plan, "shall be a single corporation"; and the "separate existence of all except the surviving corporation, shall cease." (Sec. 69(a) and (b).) (Ch. 32, Ill. Rev. Statutes, Sec. 157.69.) All property of the merged corporation "shall be taken and deemed to be transferred to and vested in" the surviving corporation "without further act or deed." (Sec. 69(d).) (Ch. 32, Ill. Rev. Statutes, Sec. 157.69.)

1. The merging corporation did not acquire the right to receive any stock in the surviving corporation.

In the minority opinion in this case, the dissenting Judge says:

"By the merger the merging corporation died,—it no longer had any existence; * * * I cannot read

into this study of the facts any right in the merging corporation to receive stock which it has transferred to its stockholders." (Tr. 44-5.)

The instant case does not involve the transfer of stock legal title to which, before the merger, was in the merging corporation itself. If as a result of the merger any such stock had become the individual property of the stockholders, there would have been a change in the title to that stock,—constituting a taxable transfer. It would be immaterial whether such a transfer were regarded as by the merging corporation, through the very act of merger, or by the surviving corporation upon acquiring the property of the merging corporation. Stock that was unquestionably corporate-owned before the merger would have become individually owned. However, in the instant case the effort is to tax an alleged transfer of stock *the title to which has been and still is unchanged.*

In support of this first finding, we refer to the decision in the case of *Helvering* v. *Metropolitan Edison Company,* 306 U. S. 520. In that case this Court was considering the question whether a transaction involving Pennsylvania corporations was

> "a true merger or consolidation whereby the identity of the corporation issuing the bonds" (the merging corporation) "continues in the successor"
>
> or
>
> "a mere sale by one corporation of all its assets to another." (pp. 526-7.)

The Court concluded that it was the former, being:

> "within the principle that the corporate personality of the transferor is drowned in that of the transferee." (p. 529.)

Incidentally the *Metropolitan Edison* decision is a good authority for the fallacy of the argument, in the majority

opinion in the instant case, that it is the "end result only that counts." (See Point III.)

The fact that in a corporate merger the existence of the merging corporation is continued in the surviving corporation, and that the surviving corporation acquires no rights as against the corporation into which it is merged, has been repeatedly recognized by the courts of Illinois as well as of other states. Thus as long ago as 1895, when what are now recognized as mergers were included under the term of "consolidations", the Supreme Court of Illinois, in the case of *Chicago, Santa Fe & California Railway* v. *Ashling,* 160 Ill. 373, stated:

> "The effect of this part of the transaction was to incorporate in the Santa Fe Company the stockholders of the St. Louis Company, combining all stockholders of each company in one. This was an act of consolidation, and *not by any means necessary to a mere purchase and sale. If the transaction could be distinguished* from a consolidation *as a mere purchase and sale,* to be regarded as a fair one * * * *the St. Louis Company"* (the merging corporation) *"itself,* and not its individual stockholders, *should have received all the consideration for the property conveyed* * * *"* (p. 380); also, "When the rights, franchises and effects of two or more corporations are, by legal authority and agreement of the parties, combined and united into one whole, and committed to a single corporation, the stockholders of which are composed of those * * * of the companies thus agreeing, this is, in law and according to a common understanding, a consolidation of such companies." (p. 382-3.)

As long ago as 1898 the Supreme Court of Ohio said, in the case of *Compton* v. *Railway Company,* 45 Ohio State 592:

> "A sale implies a vendor and a vendee. * * * The vendor parts with nothing but his property, and for

it receives a *quid pro quo. Such is not the case where companies are consolidated under this statute.* It is true that the owner of each constituent hereto" (the merging corporations) "parts with its property, but it does much more; it not only parts with its property but ceases to be a juristical entity capable of owning or acquiring property. *It does not, and could not, receive any consideration for the transfer, because it is extinguished and dissolved by the act of its stockholders in assenting to the proposed agreement.*" (p. 615.)

In *Silversmiths Company* v. *Reed and Barton Corporation,* 199 Mass. 371, the Supreme Court of that Commonwealth stated:

> *"We are of the opinion that there was no sale of these shares of the old corporation to the new corporation formed by the consolidation within the meaning of that word in this by-law.* (p. 375-6.)

2. The merging corporation did not transfer to its stockholders the right to receive any shares of the stock of the surviving corporation.

This second finding naturally follows from the first, since the merging company could transfer no right which it did not first acquire; but the reason for the second finding goes even deeper. The rights of the stockholders are continuing rights, the exact form whereof is changed by proceedings authorized by statute but the ownership of which is continuous and unchanged. The stockholders do not acquire title to the stock of the surviving corporation through the merging corporation, because *their title to stock is continuous and the change is only in the form of the stock owned.* This second proposition has also been expressly recognized in decisions of the courts of many states. We quote from two:

In *Silversmiths Company* v. *Reed and Barton Corporation*, 199 Mass. 371, the Court also said:

> "*The stock issued to the shareholders of the old corporation was issued and received,* not by way of payment for something sold to another, but *by way of a statement of the interest which those persons who are beneficially interested therein had in the new corporation as a result of the consolidation.*" (p. 375.)

In *King Estate* (349 Pa. St. 27) the Supreme Court of that Commonwealth said (quoting an earlier decision):

> "The issuance of the new capital stock is merely the issuance of new evidence of ownership to the shareholders. Accepting shares of stock in the merged company is not tantamount to a distribution or division of assets * * *." (p. 31.)

The majority opinion in the instant case disregards the nature and effects of corporate mergers by characterizing their operation as the "alchemy of corporate fiction" and stating that the tax statutes will not be "thwarted by fictions." A statutory merger is no more a fiction than were the incorporation proceedings of the two corporations whose existences are merged. The Internal Revenue Act repeatedly mentions corporate mergers as operations having specified tax consequences. They are not to be passed off as "fictions."

POINT II.

Treasury Regulations and interpretations in force while the statutes are repeatedly re-enacted without substantial change are deemed to have received legislative approval and have the effect of law.

The above heading is in substance a statement in this Court's opinion in *Helvering* v. *Winmill,* 305 U. S. 79 (83). The decision has been cited, and the quotation substantially repeated, in such recent decisions as *Commissioner* v. *Wheeler,* 324 U. S. 542 (footnote 10, p. 547) and *Helvering* v. *Griffiths,* 318 U. S. 371 (footnote 47, p. 396).

We shall show below:

(a) That the legislative and regulatory record brings the instant case within this rule; and

(b) That the majority opinion, holding otherwise, reflects a misconception of this record.

(a) Legislative and Regulatory Record.

The Regulations in effect from 1926 to 1941 gave the following "example of a transaction not subject to the tax" under Section 1802(b):

> "The transfer of the stock of a merged corporation in exchange for stock of the merging corporation at the time and as a part of a statutory merger * * *" (Reg. 71, Art. 35-(e)).

While the Commissioner's reference to the transaction as an "exchange" is not technically exact, there can be no question but that this Regulation held both sides of the "exchange" to be exempt from this tax. In no sense is the question "left open" as to either side. While this Regulation was in effect the statute was repeatedly re-enacted.

In 1941 the Regulations were amended; and this section was rewritten. The corresponding section of the new Regulations replaced the word "exchange" (an operation having two sides) with the word "surrender". Reg. 71, Secs. 113.30, 113.33 and 113.34. It may be that, by this substitution of the word "surrender", the Commissioner intended to "leave open" the question whether the merged corporation, "stock in which was surrendered", acquired and transferred a right to receive stock in the continuing corporation. If so, his intention escaped the notice of tax practitioners generally.

In 1942 the Commissioner issued an opinion, M. T. 3, in response to a request for advice. That opinion did not so much as mention the Regulations; but it did interpret the *Raybestos* case as an authority for taxing, in a statutory consolidation, a situation analogous to that here presented in respect to a merger. Solely on the basis of this interpretation of the *Raybestos* case, the Commissioner started his country-wide campaign to collect tax on the supposed transfers, made after the date of M. T. 3, by the merged corporations of the right to receive stock in continuing corporations. The Regulation itself still stands just as it was left by the 1941 rewording.

(b) Misconception of Record by the Circuit Court of Appeals.

The majority opinion of the Circuit Court of Appeals states that, at the time of the *Raybestos Manhattan* decision, rendered in 1935, "the Regulations of the Internal Revenue Bureau left open, as did that case, the question of whether the merger situation was within Section 1802(b)." (Tr. 44.) As is shown above, the Court errs in this statement. The Regulations in effect during the fifteen year

period, 1926 to 1941, did not leave the question "open" but held the exchange exempt.

The opinion then continues:

> "Later the Bureau decided that the statute authorized the taxation of the merger and amended its regulations accordingly."

In support of this statement the Court refers by footnote to Sections 113.30, 113.33 and 113.34 of Regulations 71, as they were in effect in 1943. (Tr. 44.)

Section 113.30 is a general statement of the scope of Section 1802(b) and does not even mention mergers. Section 113.33 does mention mergers, but only relates to transfers, of stock owned by the merged corporation, into the name of the continuing corporation. This provision was not new; and it applies to transfers of stock *in other corporations*, which stock was owned by the merged corporation before the merger and was acquired by the continuing corporation in the merger. That has nothing to do with this situation.

Section 113.34 is the section which we have quoted as substituting the word "surrender" for "exchange". It holds *exempt* from tax "in a merger of corporations, the surrender of stock of both the merging and continuing corporations in exchange for stock of the continuing corporation."

When this case arose the Regulations *did not reflect* the Commissioner's decision "that the statute authorized the taxation of the merger situation." To a casual reader, the Regulations as they now exist would seem to fully exempt such a situation from any tax. At most, it could be argued that, while the previous Regulations clearly exempted such a transaction, the 1941 amendment, by its ambiguous language, "left open" the effect of acts by the recipient of the "surrender", if indeed a proposition that

has been settled for years is "left open" by a mere failure to specifically mention it.

Having utterly misconceived the legislative history of this tax and the provisions of the Regulations interpreting the statute, the majority opinion proceeds to incorrectly state petitioner's contention and asserts that this contention is conclusively answered to the contrary by the case of *Helvering* v. *Wilshire Oil Company,* 308 U. S. 90. In that case the Commissioner had changed his Regulations as to the manner of treating development expense in ascertaining the net income from oil property for the purpose of applying the statutory limitation of the depletion deduction to that net income (Code Sec. 114(b)(3)); and in so doing he was exercising his power conferred by Section 23(m) of the Revenue Code to prescribe rules and regulations defining a reasonable allowance for depletion. In sustaining the Commissioner's action this Court held that the ascertainment of depletion allowances involves technical factors calling for continued study, and that the Commissioner might properly conform his rules to changes reflecting experience and new insight. (p. 103.)

The Court stated further that the rule as to the implied legislative approval of Regulations covers situations where ambiguities in practice or rules are resolved by the application of the rules prior to the re-enactment. (p. 100.)

In the instant case the power to make regulations was conferred by Code Sections 1836 and 3791, which merely grant the power to promulgate rules and regulations "for the enforcement of this title."

This Court has frequently expressed itself as to the effect of reenactments of the Revenue Act while this type of interpretative regulations are in effect; and its expressions have been substantially the same both before and after the *Wilshire* decision.

To restate our position under Points I and II we respectfully submit:

(a) The application of Section 1802(b) is clearly and unambiguously confined to sales and transfers of stock, and of rights to receive stock (see Point I); and the original regulations correctly interpreted the statute.

(b) Even if the statute could be regarded as ambiguous as to whether its coverage extends at all to cases where there were no actual sales or transfers but where there were transactions, the effects and "results" of which had some analogy to transfers,—then with respect to statutory mergers that ambiguity was resolved by the specific rulings of exemption from tax by regulations in effect for fifteen years buttressed by reenactments of the statute without amendment.

POINT III.

Statutory mergers are repeatedly recognized and given tax consequences in the Internal Revenue Code and by court decisions.

I. Statutory Recognition.

"A statutory merger or consolidation" is the first of the four transactions included in a definition of "reorganization" in Section 112(g). This definition by cross references is in effect repeatedly incorporated by reference in other provisions (for example, Section 112(b)(3), Section 112(b)(9), and Section 113(b)(4)).

Similarly the "statutory merger" is one of the five types of transactions mentioned as creating a "component corporation" under the Excess Profits Tax provisions (Section 740(b)(3)). This, too, is incorporated by reference in numerous other sections and subsections, particularly of the Excess Profits Tax provisions. Statutory mergers

are also expressly mentioned in Section 761(f) of the Excess Profits Tax provisions.

II. Decisions.

Courts have recognized the distinction between statutory mergers, and mere purchases of assets with assumption of liabilities, in numerous decisions; and have indicated that different tax consequences flow from such differences. Thus, in *Helvering* v. *Metropolitan Edison Co.*, 306 U. S. 522, (cited under point I), this Court said:

> "The petitioner" (Commissioner of Internal Revenue) "concedes that if there has been a *true merger or consolidation whereby the identity of the corporation issuing the bonds continues in the successor* • • • the successor may deduct amortization of discount and expense in respect of bonds issued by its predecessor • • • *The rule is not applicable upon a mere sale by one corporation of all its assets to another which assumes the liabilities of the former.*" (p. 526.)

On this point the opinion cites eight decisions, including those of Circuit Courts of Appeals, Court of Claims and United States Board of Tax Appeals. (Notes 9 and 10, pp. 526-7.)

The United States Board of Tax Appeals has repeatedly recognized surviving corporations as the legal successors of merging corporations, and as such entitled to petition the Board for the review of deficiency letters issued in the names of the merging corporations. For example: *Alaska Salmon Company* v. *Commissioner*, 39 B. T. A. 455 (Washington and California merger statutes); also *Trahern Pump Company* v. *Commissioner*, 27 B. T. A. 363. (Illinois Statutes.) No mere successor by liquidation, or by purchase of corporate assets, could do this. *Carnation Milk Products Co.* v. *Commissioner*, 20 B. T. A. 627. (p. 634.)

POINT IV.

The question whether a statutory corporate merger involves a stock transfer taxable under Section 1802(b) has never been decided by this Court.

The thought that the decision of this Court in the case of *Raybestos-Manhattan, Inc.* v. *United States,* 296 U. S. 60, is a precedent for such a tax is based entirely on the assumption that a corporate merger involves a transfer of its assets by the merged corporation to the surviving corporation. As shown in Part I, this assumption is not well founded.

The transaction which was dealt with in the *Raybestos* case was an actual assignment of all corporate assets by one corporation to another corporation, in return for which it was agreed that the transferee should issue its shares direct to the shareholders of the transferor. This Court held that by assigning its assets the transferor purchased the right to stock in *Raybestos-Manhattan, Inc.,* and that by directing the issue of this stock to its own stockholders the transferor assigned its right to this stock.

> "It's language" (Section 1802(b)) "discloses the general purpose to tax every transaction whereby the right to be or become a shareholder of a corporation, or to receive any certificate of any interest in its property, *is surrendered by one and vested in another.* * * * While the Statute speaks of transfers, it does not require that the transfer shall be directly from the hand of the transferor to that of the transferee. *It is enough if the right or interest transferred is,* by any form of procedure, *relinquished by one and vested in another.* * * * In the present case the generating source of the right to receive the newly issued shares of the petitioner was the conveyance to it of the property of each of the corporations to be consolidated.

The new shares could not lawfully be issued to any other than the grantor corporation without its authority. * * *." (296 U. S. 63-4.)

This language we submit is not applicable to the facts of the instant case. Here the merging corporation acquired no right to receive stock and did not relinquish such a right to its shareholders. There was a continuity of ownership of the stock with only a change in its form from shares in the merged corporation into shares in the surviving corporation. The "generating source" of the continued ownership of these shares (in their changed form) was this stock ownership plus the stockholders' exercise, in the manner specified by the Illinois Statute, of their right to vote the merger.

In addition to the transaction dealt with, the Raybestos case included a separate statutory merger. With respect to that merger, the Court of Claims stated (*Raybestos-Manhattan, Inc.* v. *United States*, 10 Fed. Sup. 130, at 135) "No tax question growing out of the stock issued by the plaintiff from this transaction is involved in this case." This is recognized by the Circuit Court of Appeals in the instant case; and it treats the Raybestos case as an authority solely on the theory that, if it had occurred to the Commissioner to also claim a tax on a theoretical assignment included in the Raybestos statutory merger, this Court would have sustained such a tax. We submit that this Court's decision does not admit of that interpretation, involving as it does a distortion of the nature of a corporate merger. (See Point I.)

Some years after this Court's decision in the *Raybestos* case it occurred to the Commissioner that the language above quoted might be applied to corporate mergers,—transactions which he had ruled exempt from tax by regulations of some sixteen years' standing. This attempted

extension of this Court's decision has caused disputes and litigation now pending, to our knowledge, in several Circuits. The question should be settled now; and we submit that it should be settled by adhering to the long-established and recognized interpretation of the Statute.

POINT V.

Tax Liability accrues only upon the occurrence of a taxable event.

From time to time it has been suggested, both by the Commissioner and by taxpayers, that a certain transaction should or should not be subjected to tax because the same result could have been accomplished by other means which would have had different tax consequences. So, in the instant case, it is suggested that a tax should be imposed because there is no substantial difference between the end result of a corporate merger and the acquisition of all the assets of the merging corporation in exchange for stock in the acquiring corporation.

This Court stated this type of argument when advanced in behalf of a taxpayer, and gave its conclusive answer to it, in the case of *Founders General Company* v. *Hoey*, 300 U. S. 268:

> "It is suggested that in each case the taxpayer might have attained his ultimate purpose by a form of transaction which would not have subjected him to the tax. The suggestion, if true, furnishes no reason for relieving him of tax when, for whatever reason, he chooses a mode of dealing within the terms of the Act. * * * *To make the taxability of the transaction depend upon the determination whether there existed an alternative form which the statute did not tax would create burden and uncertainty.*" (p. 275.)

This statement is so conclusive on this point that we content ourselves with merely repeating its restatement as made by the Federal District Court for the Southern District of New York in the case of *American Gas and Electric Company* v. *United States,* 69 Fed. Sup. 614:

> "What was done, and not what might have been done, determines tax liability. (*Founders General Company* v. *Hoey,* 300 U. S. 268). There must be a fixed and indisputable mode of ascertaining a stamp tax." (p. 620-1.)

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 549

AMERICAN PROCESSING & SALES COMPANY,
PETITIONER

v.

NIGEL D. CAMPBELL, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court did not promulgate a written opinion in this case.[1] The opinion of the Circuit Court of Appeals (R. 40–46) is not yet officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 9, 1947. (R. 47.)

[1] The findings of fact and conclusions of law by the District Court are set forth at pages 24–26 of the record.

The petition for a writ of certiorari was filed on January 26, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In the statutory merger of two corporations, whereby the assets of the merging corporation were transferred to the surviving corporation and stock in the surviving corporation was issued directly to the stockholders of the merging corporation, is there a taxable transfer of the right to receive stock by the merging corporation to its stockholders within the meaning of Section 1802 (b) of the Internal Revenue Code?

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 1800. IMPOSITION OF TAX.
>
> There shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in sections 1801 to 1807, inclusive, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, the several taxes specified in such sections.
>
> (26 U. S. C. 1940 ed., Sec. 1800.)

SEC. 1802. CAPITAL STOCK (AND SIMILAR INTERESTS).

* * * * *

(b) [as amended by Section 1 of the Revenue Act of 1939, c. 247, 53 Stat. 862, Sec. 209 of the First Revenue Act of 1940, c. 419, 54 Stat. 516, and Section 521 (a) (5) of the Revenue Act of 1941, c. 412, 55 Stat. 687] *Sales and Transfers.*—On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to any of the shares or certificates mentioned or described in subsection (a), or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation or other organization, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale (whether entitling the holder in any manner to the benefit of such share, certificate, interest, or rights, or not), on each $100 of par or face value or fraction thereof of the certificates of such corporation or other organization (or of the shares where no certificates were issued) 5 cents * * *.

(26 U. S. C. 1940 ed., Sec. 1802.)

STATEMENT

The facts in this case were stipulated by the parties. (R. 13–21.) The findings of fact of the District Court (R. 24–25) follow the stipula-

tion. The facts may be summarized as follows (R. 13–21, 24–25):

In 1943 Rapid Roller Company, the merging corporation, was merged under the laws of Illinois with Hawthorn-Mellody Farms Dairy, Inc., the surviving corporation, whose name was changed to American Processing & Sales Company. (R. 13–14.) Under the articles of merger all property, real, personal, and mixed, belonging to the merging corporation was deemed to have been transferred to and vested in the surviving corporation without further act or deed, although the merging corporation agreed to execute such confirmatory deeds as might be deemed appropriate. (R. 15–16.)

The merging corporation had outstanding 5,405 shares of stock which were to be surrendered, and there were to be issued to the holders of those shares, pro rata, 1,500 shares of the preferred stock and 3,800 shares of common stock of the surviving corporation. (R. 16–17.)

On April 21, 1945, the Commissioner of Internal Revenue made an assessment of tax against the taxpayer in the amount of $265, after a revenue agent had recommended the assessment on the ground that the merging corporation transferred to its stockholders the right to receive the stock that was issued to them by the surviving corporation, and that this transfer was taxable within the meaning of Section 1802 (b) of the Internal Revenue Code. After notice and demand

the taxpayer paid the tax to the Collector and later filed a claim for refund. (R. 21, 25.)

The claim was rejected by the Commissioner of Internal Revenue (R. 21, 25) and the taxpayer filed this action against the Collector. The case was tried without a jury; the court decided in favor of the taxpayer without writing a formal opinion. (R. 22.) However, the District Court made findings of fact and conclusions of law. (R. 24–26.) The Collector appealed to the court below (R. 30–31) which reversed the decision of the District Court, with Judge Lindley dissenting (R. 40–47).

ARGUMENT

The court below correctly decided that the present case is controlled by the decision of this Court in *Raybestos-Manhattan Co.* v. *United States,* 296 U. S. 60. The precise point at issue is whether in the case of a statutory merger, whereby stock of the surviving corporation (the taxpayer) was issued directly to the stockholders of the merging corporation, there was a taxable transfer of the right to receive such stock by the merging corporation to its stockholders within the meaning of Section 1802 (b) of the Internal Revenue Code, as amended, *supra.* While the *Raybestos-Manhattan* case did not involve a statutory merger, but a consolidation by the transfer of assets of two constituent corporations to a newly formed corporation in exchange for the latter's

stock, the reasoning of the case applies with equal force in the instant case.

In the *Raybestos-Manhattan* case this Court explained that the right of the stockholders of the constituent corporations to receive the newly issued shares of the taxpayer resulted from the conveyance to it of the property of the constituent corporations, and that the new shares could not lawfully be issued to any other than the constituent corporations without their authority. In its opinion this Court said (p. 63):

> We think that this effective disposition of the right to receive the stock involved a taxable transfer quite as much as if the several legal relationships of the parties had been established at different times and by separate documents. It is not doubted that there would have been a taxable transfer if each corporation had conveyed its property to petitioner in exchange for its shares of stock to be issued as the grantor might direct, and had later ordered the certificates to be issued to its stockholders. The reach of a taxing act whose purpose is as obvious as the present is not to be restricted by technical refinements.

In the present case, as in the *Raybestos-Manhattan* case, the generating source of the right of the stockholders of the merging corporation to receive the newly issued shares of the taxpayer was the conveyance to it of the property of the merging corporation. The Articles of Merger read in part (R. 15–16):

> All property, real, personal, and mixed, all receivables of whatever kind, all choses in action, and all and every other interest of or belonging or due to the merging corporation shall be taken and deemed to have been transferred to and vested in the surviving corporation without further act or deed, although the merging corporation shall execute such confirmatory deeds or other instruments as may be deemed appropriate.

Since, in both the instant case and the *Raybestos-Manhattan* case, one corporation conveyed all of its assets to another and this conveyance gave rise to the issuance of stock of the transferee corporation to the stockholders of the merging or disappearing corporation, the two cases are alike in principle. If there was a taxable transfer from the merging or constituent corporation to its stockholders of the right to receive stock in the surviving corporation within the meaning of Section 1802 (b) of the Internal Revenue Code or the corresponding provision of an earlier Revenue Act in the one case, there would seem to be such a taxable transfer in the other case. See M. T. 3, 1942–2 Cum. Bull. 257[2]; also *Emporium Cap-*

[2] This ruling was applied only from the date of its publication, and not retroactively. M. T. 17, 1943 Cum. Bull. 1166. Prior to the publication of M. T. 3, the Commissioner as a matter of practice had not sought to impose a tax upon the transfer by the merging corporation of the right to receive stock of the new company in the case of statutory mergers or consolidations. The Treasury Regulations have

well Co. v. *Anglim,* 140 F. 2d 224 (C. C. A. 9th), certiorari denied, 322 U. S. 752, and *United States* v. *Niagara Hudson Power Corp.,* 53 F. Supp. 796 (S. D. N. Y.).

The taxpayer argues that the merging corporation did not acquire the right to receive any stock in the surviving corporation, and that there could not have been a transfer of such a right to its stockholders. (Br. 11–16.) The dissenting opinion rests largely upon the same ground. (R. 44–46.) The basis of this argument is that under the laws of Illinois the merging corporation ceased to exist at the time of the merger, and so could not have received the stock of the surviving corporation and could not have transferred it to others. In another case involving the application of the stamp tax on transfers of stock, *Founders General Co.* v. *Hoey,* 300 U. S. 268, this Court said (p. 275): "* * * we are not to look beyond the Act for further criteria of taxability." Otherwise there would not be a uniform application of the statute. See also *Cliffs Corp.* v. *United States,* 103 F. 2d 77, 80 (C. C. A. 6th), certiorari

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never covered the precise question, thus leaving the matter open. See Treasury Regulations 71 (Revised July, 1932), Art. 35 (e), and Treasury Regulations 71 (1941 ed.), Sec. 113.34 (i). While the court below inadvertently said in its opinion that the Regulations were amended (R. 44) to accord with the Bureau's decision that the statute authorized the taxation of the "merger situation," the reference should have been to the ruling, M. T. 3.

denied, 308 U. S. 575; *Weil* v. *United States,* 115 F. 2d 999, 1002 (C. C. A. 2d), certiorari denied, 313 U. S. 574. The taxpayer relies upon the decision of this Court in *Helvering* v. *Metro. Edison Co.,* 306 U. S. 522 (Br. 13); but that case did not involve a stamp tax on a transfer of stock or of the right to receive stock.

The taxpayer also argues that prior to 1941 the Treasury Regulations provided that such a transfer as that in the instant case was exempt, and implies that the Regulations could not have been changed without a statutory enactment. (Br. 17–21.) Since the transaction in this case took place in 1943, the Regulations promulgated in 1941 apply and the power of the Commissioner to issue those Regulations is beyond question. *Helvering* v. *Wilshire Oil Co.,* 308 U. S. 90, 100. Furthermore, the taxpayer has misconstrued the Regulations in effect prior to 1941. Both the Regulations prior to 1941 and the Regulations as amended in 1941 were intended to exempt from tax only the transaction whereby the stockholder in the merging corporation *surrenders* his stock in that corporation, and not to the transfer of the stock in the surviving corporation to the stockholders in the merging corporation. The purpose of the amendment made to the Regulations in 1941 was merely to clarify the old Regulations, not to change them.

CONCLUSION

The decision of the court below is correct, and is controlled in principle by a decision of this Court. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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